A legal note from Marshal Willick about how Nevada can have jurisdiction to award child support, but not affect child custody, in a single case.

An attorney wrote in, asking for assistance in a case where a separating non-custodial parent had come to Nevada and filed an action seeking both child custody and child support orders, but the custodial parent and the children continued to live outside Nevada, in a place they had been for more than six months. The court seemed uncertain whether it could issue orders relating to custody, or to support – or both, or neither. There is a clear and certain answer under modern law, but it requires a bit of stepping through.

I. SELECTED CASE LAW

Virtually all of the earlier case law addressing child custody and child support jurisdiction was rendered moot, or at least questionable, by the adoption of the Uniform Interstate Family Support Act ("UIFSA") in 1997, and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") in 2003. Both were created by the National Conference of Commissioners on Uniform State Laws ("NCCUSL," the body that drafts such uniform laws).

Both current statutory schemes replaced older versions – UIFSA replaced the kludgy statute known as URESA, and the UCCJEA replaced the less-certain UCCJA. Some of the cases decided under the older statutes remain viable, however – to the extent they correspond to the newer controlling statutory schemes.

In 1990, the Nevada Supreme Court decided *Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990). The primary holding of the case is that where there is no subject matter jurisdiction, our courts cannot make a valid custody order. That holding remains valid, although the specific steps of the test applied to reach it have been superseded.

In 1997, the Court was more detailed in finding that a Nevada trial court had continuing jurisdiction to modify a prior custody decree because one parent remained in Nevada, although the other parent and the children had moved elsewhere. (*Lewis v. District Court*, 113 Nev. 106, 930 P.2d 770 (1997)). Again, the holding remains valid although the statutory provisions applied have been changed. In fact, *Lewis* is a great example of why the statutes were changed – it was a divided opinion that fractured along one of the subjective fault lines that the newer statutes were supposed to eliminate in favor of fully objective tests.

In 2002 – just one year before Nevada switched to the UCCJEA from the older UCCJA – the Court decided *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002), which included the holding:

> Simply because a court might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation.

That holding was the only one in the three cases discussed above to differentiate support and custody

jurisdiction. It also is still valid, although the interplay of statutes that makes it so is a bit convoluted.

II. NO CUSTODY JURISDICTION

Nevada has no possible jurisdiction to address child custody on the facts posited. Since the children had a Home State elsewhere when the Nevada litigant filed here, no further inquiry about the significance of anyone's connections with here (or any place other than the Home State) has any relevance. Only if there had ***not*** been such a Home State would such "significant connection" analyses have been relevant, and the controlling statute, NRS 125A.305, now clearly provides the ***exclusive*** potential bases of custody jurisdiction.

III. BUT – FULL CHILD SUPPORT JURISDICTION

UIFSA has existed since 1992. In 1996, Congress essentially mandated national uniform adoption of the model act through changes in the welfare laws. Nevada adopted UIFSA as chapter 130 of the Nevada Revised Statutes in 1997.

In 2001, NCCUSL met to clarify UIFSA. The Comments stress "A single meeting in March 2001 led to significant substantive and procedural amendments that ultimately were approved by the Conference at its Annual Meeting in August, 2001. None of the amendments, however, make a fundamental change in the policies and procedures established in UIFSA 1996. . . . In sum, although two sets of amendments have been propounded since the initial 1992 version of UIFSA, its basic principles have remained constant."

In other words, while the Nevada Legislature did not revisit NRS Chapter 130 to enact those wording changes for another six years (in 2007), the amendments were meant only as a matter of ***clarification***, not a substantive change, to the provisions as enacted by the Nevada Legislature in 1997. The law has had the same meaning since its adoption. It has ***always*** meant what it clearly says now.

The clarified language states the intention of UIFSA – at all times – was to ensure that the jurisdictional rules for support initiation were deliberately "expansive." There are multiple bases for exercise of child support jurisdiction over an obligor, whether that person is a resident or a non-resident, operating independently and in the alternative. They include:

> 2. Submission by the obligor to the jurisdiction of this State in a record, by consent, by entering a general appearance or filing a responsive document having the effect of waiving any contest to personal jurisdiction.
> . . . .
> 7. Any other basis "consistent with the Constitution of this state and the Constitution of the United States for exercise of personal jurisdiction."

NRS 130.201.

In short, under the posited facts, the Nevada family court gained subject matter and personal jurisdiction to order the non-custodial parent to pay child support the moment ***he filed a proceeding here requesting a child support order*** – and regardless of the court's jurisdiction over any other aspect of the parties' case. He submitted to the jurisdiction of the Nevada Court by specifically asking for entry of a child support order.

The official comments to the Model Act explain the deletion in the final act (2001) of the previous heading reference to "extended personal jurisdiction," making it clear that any of the enumerated acts convey full subject matter ***and*** personal jurisdiction to enter a child support award, as the face of the text itself clearly indicates.

In fact, under these facts, the trial court is ***required*** to enter a child support order and may not choose to do otherwise. The Official Comments to § 611 (our NRS 130.611) state that under UIFSA, a court ***may not elect to decline*** jurisdiction to hear the merits of a modification motion once the jurisdictional basis for proceeding here has been established.

In Nevada, jurisdiction is established at the moment that an "action" or "proceeding" (*e.g.*, a complaint seeking to establish child support) is filed. *See Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988) (time for test of subject matter and personal jurisdiction is that of the filing of the current proceeding before the court). At the moment the request for a child support order was filed in Nevada, the Nevada court lacked the "privilege of declining jurisdiction" and was obliged to adjudicate child support under Nevada law.

IV. CONCLUSIONS: WHAT COURTS MAY DO, AND WHAT THEY ***MUST*** DO

By both case law and statute, the contours of the concept of "jurisdiction" have evolved considerably in the decades since the United States Supreme Court declared that under the principle of "divisible divorce," jurisdiction over a marriage does not necessarily carry with it jurisdiction to alter every legal incident of marriage. (*Estin v. Estin*, 334 U.S. 541 (1948)).

The relevant legal tests for custody jurisdiction, or support jurisdiction, are considerably different from the personal jurisdiction test for divorce – the custody statute (NRS 125A.305(3)) states on its face that "physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination."

This "bundle of sticks" view of jurisdiction, where a court may have the ability to enter orders about one thing, but not another, has been further fleshed out. Statutory rules specify not only those subjects about which a court may not enter orders despite the desire to do so (as with custody in the facts above), but where it ***must*** enter an order, whether it is inclined to do so or not (as with support in this situation). Courts choosing to do other than what the newer, clearer rules prohibit – or require – do so at the risk of facial reversible error.

VI. QUOTES OF THE ISSUE

"It is part of my duty to expound the jurisdiction of the Court. It is no part of my duty to expand it."
– *In re Montagu* (1897) L.R. 1 C.D., p. 693, Kekewich, J.

"Lawful, *adj*. Compatible with the will of a judge having jurisdiction."
– Ambrose Bierce, *The Unabridged Devil's Dictionary* (1911).

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